In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1108

CHAMBERSBURG BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner is the licensee of a daytime radio station, operating with a power of 1 kilowatt in Chambersburg, Pennsylvania. It applied to the Commission. (R. 1–116) [1] for permission to increase its power to 5 kilowatts. After full administrative proceedings, the Commission found that the application was barred

[1] R. —— refers to the record of Commission proceedings filed in the court below. J.A. —— refers to the multilithed Joint Appendix.

256-955—67

by its "10% rule," 47 CFR 73.28(d)(3).[2] This rule disqualifies, with certain exceptions, proposals for use of a frequency by a station whose signal would receive electrical interference affecting more than 10% of the population within its normally protected service area.

Because petitioner would have received 13.7% interference, it introduced evidence before the Hearing Examiner to support its claim that a waiver of the rule would be in the public interest. The Examiner recommended a waiver and approval of petitioner's application to increase power (J.A. 10–24). The Commission's Review Board adopted certain of the Examiner's findings setting forth the reasons why the

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[2] In 1964, the Commission adopted entirely new and more stringent allocations criteria for the consideration of future AM applications. 29 F.R. 9492. The "10% rule" involved in this case is thus no longer in force except for the relatively few applications still pending which were filed before the rules were changed.

In pertinent part, the rule is as follows:

"(d) With respect to applications for new Class II–A stations, and other applications accepted for filing before July 13, 1964, the following shall apply: Upon showing that a need exists, a Class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour, subject to the following conditions: * * * (3) The interference received does not affect more than 10 per cent of the population in the proposed station's normally protected primary service area; however, in the event that the nighttime interference received by a proposed Class II or III station would exceed this amount, then an assignment may be made if the proposed station would provide either a standard broadcast nighttime facility to a community not having such a facility or if 25 per cent or more of the nighttime primary service area of the proposed station is without primary nighttime service. * * *"

public interest would be advanced by a grant to petitioner but determined, after careful evaluation of the petitioner's application, that a waiver of the rule was not justified, and accordingly denied the application (J.A. 25–42). The Commission granted limited discretionary review of one contention but left the Review Board's ruling undisturbed (J.A. 46–48).

The Commission has been granted broad discretion in allocating radio frequencies, *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358. The "10% rule" was designed to strike a balance between excessive interference and too restricted use of available frequencies, thus implementing the Commission's mandate "to provide a fair, efficient, and equitable distribution of radio service," 47 U.S.C. 307(b). Application of the rule here, as the court below found (Pet. App. 1a–4a), was entirely reasonable and is supported by substantial evidence in the record. Moreover, the rule involved, with minor exceptions, is no longer in force. (See n. 2, p. 2, *supra.*) Further review of this record is therefore unwarranted.

The Commission correctly refused to adopt petitioner's argument that a grant to its local competitor, WCBG, compelled a grant to petitioner. The WCBG grant was for a *nighttime* proposal which provided the first local nighttime transmission service for Chambersburg. As such, it helped to fulfill one of the Commission's prime allocation objectives and came within the specific exception to the 10% rule for proposals which "provide * * * a standard broadcast nighttime facility to a community not having such a

facility * * *"[3] While WCBG's nighttime signal was lost to some 18.6% of the population in its area, the Commission properly found this to be reasonable in view of the technological limitations on night broadcasting.[4]

Other cases in which the "10% rule" was waived were carefully considered by the Commission but presented factually distinguishable situations which were not dispositive of the petitioner's request for waiver.[5] Similarly, petitioner's assertion that a grant of its application would have no adverse impact on allocation policies was properly rejected. As the Commission has pointed out, each additional signal or increase in signal on a channel degrades the channel to some degree, so that, although each additional signal considered alone may be tolerable, the cumulative effect of an excessive number of signals may be-

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[3] See note 2, *supra*.

[4] Night broadcasting is subject to "skywave" interference which restricts the scope of night service. Daytime signals are unaffected by this kind of interference and the relative standard of efficiency is accordingly higher for daytime than for nighttime service. Thus, a 13% interference loss in daytime broadcasting is ordinarily unsatisfactory, while an 18% loss at night may nevertheless constitute an efficient use of the frequency. See *Daytime-Skywave*, 27 F.C.C. 587, 588–589.

[5] Thus, the Commission held *Thomas County Broadcasting Co., Inc.*, 35 F.C.C. 525, to be inapplicable because there, the authorized service resulted in some reduction in interference, not an increase (J.A. 47). And in *Stephens County Broadcasting Co.*, 30 F.C.C. 921, grant of the application involved a change of frequency which freed the applicant's frequency for other uses, extended service of special local interest, and did not involve nearly as large a violation of the 10% rule (J.A. 32–33).

come objectionable. *Standard of Good Engineering Practice Concerning Standard Broadcast Stations,* 19 F.R. 5141. These are precisely the kind of technical issues concerning the optimum use of frequencies which are committed to the Commission's expert discretion. See *e.g. James S. Rivers, Inc.* v. *F.C.C.,* 351 F. 2d 194 (C.A.D.C.); *Goodwill Stations, Inc.* v. *F.C.C.,* 325 F. 2d 637 (C.A.D.C.).

In the circumstances, we believe the Commission's ruling was properly sustained by the court below and that the petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

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